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NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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(RULE 22.5)

MAY IT PLEASE THE COURT:

The seminal or "bottom line" question posed in this application is whether mineral extractive operations conducted on fixed platforms constitute "maritime employment" as that term is used in the Longshoremen & Harbor Workers Compensation Act. The dispute is cleanly focused by Arguments Numbers 1 and 2 of the brief in opposition in this case. Stated differently, while both "situs" and "status" are at issue here, a resolution of "status" will compel the decision on situs.

This is so because, if mineral extractive operations

are "maritime employment" then the platforms where they are conducted can arguably be a "covered situs" under the LHWCA and our contentions in the original application and the "reasons" in support of this do not contravene this. The cases cited by the authors of the brief in opposition in footnote 6 page 6 generally support this proposition.

On this point, however, it is interesting to note that there is no serious argument in the brief in opposition about whether or not mineral extractive operations constitute "maritime employment". It seems to be accepted that this is so because the Fifth Circuit has held it to be so, and the argument simply proceeds from that conclusion without any real analysis supporting the correctness of this obviously flawed premise.

The fact that mineral extractive operations are not "maritime employment" is established by this Court's decision in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969) and supported by the decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). Rather than dispute the analysis of those decisions, the brief in opposition contents itself with affixing a label of "inapposite" on them. It does this because these decisions involved accidents on the outer continental shelf rather than accidents in territorial waters. However, in the context of the decision and what it is cited for here, that factor makes no difference. The nature of the activities of the particular workmen is what we are driving at, not the geographical location of the accidents.

In *Rodrigue* and *Huson*, had the conclusion of this Court been that the mineral extractive operations they were engaged in were "maritime" in nature, the result of those cases would have been markedly different. The fact

is that the same general sort of work which Robert Gray, plaintiff here, was performing was held by this Court to be non-maritime in nature and the whole fabric of the decisions follows from that holding, as well as a long line of jurisprudence following thereafter.

If those activities were non-maritime in that case, what justification is there for holding that they are maritime in this case? The Brief in Opposition does not say. The opinion of the Court below does not say. And the reason they do not say is that there is no justification for the holding.

The rationale and focus of this case is pointed up in the second paragraph of Argument No. 2 on page 6 of the brief in opposition. The point is made there that *Rodrigue* and *Huson* support Gray, not petitioners because of the likening of wharves to platforms. This would be so if, in fact, mineral extractive operations constituted "maritime employment" which, as pointed out above, is the underlying issue in the case, and which is something which is not addressed by the brief in opposition.

Argument No. 3 in the brief in opposition misperceives the effect of the Tower bill (S.1547, 92nd Cong.) and misperceives the effect of the action of the Fifth Circuit in *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982) wherein it "correctly rejected petitioner's argument." One of the bases of the Fifth Circuit's decision in *Boudreaux* was that there was no "roll-back" of coverage under the LHWCA, something that this Court ultimately settled in *Director v. Perini North River Associates*, __ U.S. __, 103 S.Ct. 634 (1983). It was in the context of that resolution that the comments attributed to the Fifth Circuit were made. The comments have no

application to the dispute here because there was no coverage under the LHWCA of platform workers on inshore platforms prior to 1972. Put another way, Boudreaux would have been covered by the LHWCA prior to 1972, Gray would not have been.

The point we made originally is as valid now. Gray, and workmen like him were not covered when the Tower bill was being considered. Congress likely was aware of the effect of this Court's decisions in *Rodrigue* and *Huson* concerning the non-maritime nature of mineral extractive work. The Tower bill would have covered Gray and other workers like him as well as crew members and others. Just as there is no coverage for crew members under the LHWCA because of the failure of passage of the Tower bill, there is no coverage for Gray and others like him, especially since the work they do is non-maritime as this Court has previously held.

In footnote 11, page 10 of the brief in opposition, the case of *Victory Carriers v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971) is labeled "inapposite" because the thrust of the case was somewhat different (which is true). However, the citation was for the purpose of demonstrating that this Court has not hesitated to decline to extend the coverage of the LHWCA to areas (either geographical or activity related) not mentioned by Congress, despite the "checkered" effect decried in Footnote 10. The point is that in *Law*, there was no coverage for landside longshoremen because Congress had not ordained it despite the fact that shipside longshoremen were covered. The same reasoning is applicable here. Congress has ordained coverage for mineral extractive workmen on the outer continental shelf regardless of what they are doing or where they are doing it as long as it is on the shelf.

By the same token as the longshoremen in *Law*, there is no coverage here for Gray because Congress has not ordained it, even to the point of failing to pass a bill which would have provided coverage. This lack of coverage exists even though the workmen on the outer continental shelf would be covered.

These factors considered, the opinion and reasoning of this Court in *Law* is not deserving of the label affixed to it by the brief in opposition and the lack of response to the argument otherwise is noteworthy.

Finally, we note that the brief in opposition, in its argument number 4 introduces an issue which is not before the Court, either in the questions we presented for review or the questions that the brief in opposition presented (see page [I]). It is an issue which was decided by the Benefits Review Board, but which was ignored and not even commented upon by the Fifth Circuit, probably because it is so lacking in merit. Under the circumstances, it should not have been placed before this Court in an offhanded manner.

CONCLUSION

We respectfully suggest that the application should be granted by the Court.

RESPECTFULLY SUBMITTED

WOOD BROWN III
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CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this petition and all related documentation has been mailed to each opposing counsel as follows:

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Undersigned counsel makes this certificate for purposes of complying with Rule 28.3 and 28.5 of the Rules of this Court.

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